

ILEC has denied collocation space. The ILEC also should be required to allow the collocator to tour, inspect and photograph the entire central office to confirm that the space is being used as the ILEC claims. And to the extent that legitimate shortages do occur, space should be awarded on a first come, first served basis, subject to the restrictions discussed below for the ILEC's advanced services affiliate.

The issue of space allocation becomes even more acute if the Commission allows the establishment of an ILEC advanced services affiliate. Clearly, the ILEC will have every incentive to provide special benefits to its advanced services affiliate, including favorable collocation arrangements. The Commission correctly emphasized the obligation of the ILECs to "allow competitive LECs to collocate equipment to the same extent as the incumbent allows its advanced services affiliate to collocate its equipment."¹⁵⁸

Unlike CLECs, the ILEC's advanced services affiliate has unique incentives to "over consume" collocation space, and to occupy a large proportion of the available collocation space in the ILEC's central offices and other locations. Using the ILEC's collocation space allows the ILEC to "internalize" the affiliate's real estate costs, rather than paying rents to a third party landlord, making the ILEC (and the affiliate) largely indifferent to its collocation costs. Because no other competitor could be so indifferent to the amount of its collocation costs, no other party would have a similar incentive to consume scarce collocation space. At the same time, the affiliate, by consuming scarce collocation space, would realize a dual strategic benefit by denying collocation space to competitors -- both its own and the ILEC's.

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NPRM, ¶ 129.

Accordingly, some limitations on the affiliate's placement of equipment and use of space are necessary. As in the case of allocation of space in remote terminals,¹⁵⁹ the Commission should consider limiting an ILEC's separate affiliate to no more than 25% of either the currently conditioned or total unconditioned space, or a percentage of currently utilized space equal to that afforded other requesting CLECs if more than three CLECs have space requests pending.¹⁶⁰ Such a rule would ensure that there remain substantial opportunities for other competitors to collocate on a nondiscriminatory basis.

E. The Commission Should Adopt Other Collocation Requirements To Enhance Competition For Advanced Services

AT&T recommends the adoption of one other important modification to the Commission's collocation policies which would promote the development of advanced services while simultaneously improving the utilization of central office floor space.¹⁶¹ Several years ago, the Commission decided that ILECs should not permit collocators to pull copper cable into central offices and use it to interconnect with the ILEC's network, absent a specific FCC finding

¹⁵⁹ See supra Section [XX].

¹⁶⁰ This 25% requirement assures that the ILEC's advanced services affiliate can never be the only collocator in a given facility. See NPRM, ¶ 131.

¹⁶¹ The Commission also notes that ALTS has requested confirmation of the Commission's previously announced policy that allows collocators to interconnect their cages. NPRM, ¶ 133. While the Commission's prior rulings were clear and ILECs have no legitimate reason to refuse to permit interconnections, a further statement of the Commission's intent -- including a statement that parties are allowed to interconnect between physical and virtual collocations and between different forms of physical collocation -- might help eliminate any possible ambiguities in the ILEC's obligations.

that such a form of interconnection should be allowed in a particular case.¹⁶² The Commission made this decision in light of ILEC concerns that the use of non-fiber facilities could impact limited conduit and riser space with less efficient technologies. Given the specific needs of advanced services providers, the Commission should take a fresh look at that finding, and require ILECs to permit parties to interconnect using non-fiber technologies, subject to the availability of conduit and riser space.

Allowing parties to utilize copper facilities to interconnect with the ILEC network could provide important benefits in several situations. First, the availability of a copper interface could allow collocators to interconnect with copper loops in remote locations such as CEVs where space is at a premium. Second, the ability to use copper facilities to link to the ILEC's loop plant could provide important benefits even in larger central offices, since it would permit carriers to locate their advanced data service equipment in office locations near the ILEC office, and use the copper facility to extend the xDSL capable loop to a point outside the ILEC central office (assuming distance limitations on the technology permit). If collocators are only permitted to pull fiber optic cable into ILEC offices, then they would have to locate all their loop termination equipment, such as DSLAMs, within the ILEC's space. Allowing the alternative of carrying the copper facility outside the central office will give collocators more options in

¹⁶² See Expanded Interconnection with Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs, 7 FCC Rcd 7369 (1992), ¶ 99 ("interconnection of non-fiber optic cable should be permitted only upon Commission approval of a showing that such interconnection would serve the public interest in a particular case.").

equipment location, and also provide a means for them to offer advanced services in cases where collocation space is no longer available in a particular ILEC location.

IV. THE COMMISSION SHOULD REAFFIRM THE UNBUNDLING PRINCIPLES ADOPTED IN THE FIRST REPORT AND ORDER AND SHOULD NOT IMPOSE ADDITIONAL HURDLES THAT WOULD LIMIT THE AVAILABILITY OF UNES FOR THE PROVISION OF ADVANCED SERVICES.

A. The Commission Should Apply Its Existing Unbundling Criteria To Network Elements Used To Provide Advanced services And Require ILECs to Unbundle Packet Switching.

The Commission's Local Competition Order concluded that "[r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act."¹⁶³ In light of this conclusion, the Commission rejected the ILECs' claims that it should construe the § 252(d)(2) standards so as to deny access to numerous network elements, holding instead that ILECs should be required to provide unbundled access to non-proprietary elements of their networks whenever "the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."¹⁶⁴ The

¹⁶³ Local Competition Order, ¶ 283.

¹⁶⁴ Id., ¶ 285.

Commission then specifically held that each of the elements of the ILECs' networks satisfied this standard and had to be made available to new entrants on an unbundled basis.¹⁶⁵

There is no legal or policy justification for the Commission to alter these conclusions or "remove" any of the ILECs' network elements "from the unbundling obligations of section 251(c)(3)" where new entrants seek to use these elements "to provide advanced services."¹⁶⁶ As the Commission correctly concluded in the Order that accompanied this NPRM, "advanced services are telecommunications services," and thus "all equipment and facilities used in the provision of advanced services" are "network elements subject to the obligations in section 251(c)."¹⁶⁷ The ILECs' network elements are likewise just as vital to the ability of new entrants to compete effectively for the provision of advanced services as they are for the provision of traditional voice services. It would thus be arbitrary for the Commission to impose any "additional criteria" that new entrants would have to satisfy in order to obtain access to the incumbents' network elements for the provision of advanced services and would defeat § 706's objective that such services be widely and timely deployed.

The Commission should similarly reaffirm that "because sections 251(c)(2) and 251(c)(3) impose duties upon incumbent LECs," and because "[i]ncumbent LECs possess the

¹⁶⁵ See *id.*, ¶ 389 (loop); *id.*, ¶ 393 (network interface device); *id.*, ¶ 420 (switch); *id.*, ¶ 425 (tandem switch); *id.*, ¶ 447 (interoffice facilities); *id.*, ¶ 482 (signaling links and STPs); *id.*, ¶ 491 (call-related databases); *id.*, ¶¶ 499 (service management system for AIN); *id.*, ¶ 522 (operations support systems); *id.*, ¶ 540 (operator call completion services and directory assistance).

¹⁶⁶ NPRM, ¶ 181.

¹⁶⁷ *Id.*, ¶¶ 35, 57.

information necessary to assess the technical feasibility" of providing access to "particular LEC facilities," the burden is on the "incumbent LECs [to] prove" that "access [to a particular network element] is not technically feasible" before they may be excused from providing access to that element.¹⁶⁸ As the Commission has held, in order to meet that high burden an ILEC would have to prove that there is no feasible "modification" to the network element that would make it possible for a new entrant to obtain access to that element. AT&T is not aware of any network element that could not be unbundled under that standard.

In particular, AT&T is not aware of any reason why "it may not be technically feasible to offer unbundled access to individual packet switches."¹⁶⁹ Accordingly, the Commission should reaffirm that packet switching, like switching generally, is a functionality fully subject to the unbundling obligation.

Finally, while NTIA has made several highly constructive contributions to these proceedings, its suggestion that the Commission could forbear from enforcing the requirements of § 251(c) "on a service-by-service basis" cannot be adopted under the Act.¹⁷⁰ Section 10 expressly prohibits the Commission from forbearing from applying "the requirements of section 251(c)" until those requirements have been "fully implemented." At a minimum, § 251(c) cannot be found to have been fully implemented until ILECs have provided access and interconnection to all of their network elements for the provision of all services, both voice and data, that could be

¹⁶⁸ Local Competition Order, ¶ 205; see also NPRM, ¶ 182.

¹⁶⁹ NPRM, ¶ 182.

¹⁷⁰ Id., ¶ 183.

provided over their facilities and equipment, and complied with all other requirements of 251(c). In effect, the "service-by-service" suggestion would result in the Commission forbearing from enforcing the requirements of § 251(c) upon finding that those requirements have been partly implemented -- an approach foreclosed by the clear terms of the statute. Indeed, if the Commission were to deregulate certain services, the ILECs would then undoubtedly focus their investments on those deregulated services, while neglecting those capabilities that support those services still subject to regulation.

The requirement of full implementation thus precludes the Commission from deciding to forbear from enforcing § 251(c)'s standards to advanced services even if the ILECs, as they must, "give competitors access to two elements that are crucial to the development of alternative DSL services -- loop facilities capable of supporting DSL services and collocation space on ILEC premises."¹⁷¹ As with circuit-switched services, § 251(c)'s requirements cannot reasonably be found to have been fully implemented unless and until, among other things, the ILECs also provide nondiscriminatory access to all of their network elements (including the NID, packet switching, transport, xDSL equipped loops, and OSS) at cost-based rates, comply with § 251(c)'s obligation to provide all means of interconnection, and make each of the advanced services that they provide to their own customers available for resale under § 251(c)(4) at wholesale rates.

¹⁷¹ NTIA ex parte, p. 8. Letter from Larry Irving, United States Department of Commerce, to William E. Kennard, Chairman, Federal Communications Commission, July 17, 1998, p. 8.

B. The Commission Should Clarify That The ILECs May Not Procure Or Accept Language In Their Licensing Agreements With Third-Party Vendors That Purports To Prohibit The ILECs From Complying With Their Nondiscriminatory Access And Interconnection Obligations.

In addition to reaffirming and clarifying the ILECs' access and interconnection obligations discussed above, there is an additional issue that the Commission must resolve if new entrants are to obtain the nondiscriminatory access to unbundled elements that is necessary to ensure that entrants will be able efficiently and rapidly to offer a broad array of advanced services: the scope of the ILECs' obligations regarding their intellectual property licensing arrangements with third party vendors. Specifically, the Commission should clarify, consistent with its resolution of this issue under § 259, that if an ILEC's existing licensing agreements in fact prevent the ILEC from providing nondiscriminatory access to one or more of its network elements, § 251(c) "requires the [incumbent] LEC to seek, to obtain and to provide necessary licensing, subject to reimbursement" in accordance with the pricing rules applicable to network elements.¹⁷²

Ever since the Commission issued its First Report and Order, the ILECs have sought, both in arbitrations before the state commissions and elsewhere, to interpose numerous obstacles to the ability of entrants to obtain the nondiscriminatory access to network elements to which they are legally entitled. One such obstacle is the claim the ILECs have advanced in those

¹⁷² Report and Order, Infrastructure Sharing, 12 FCC Rcd 5470 (1997), ¶ 69 ("Infrastructure Sharing Order"). This issue has been fully briefed in Petition of MCI for Declaratory Ruling, CC Docket 96-98, CCBPol 97-4. AT&T incorporates by reference its comments, reply comments, and ex partes in that proceeding. The Commission should resolve this issue either in this proceeding, or in the proceeding initiated to resolve MCI's petition for declaratory ruling. Id.

arbitrations, and incorporated in numerous SGATs, that when a new entrant obtains access to an incumbent's network elements it must obtain its own intellectual property licenses (or certificate that no licenses are necessary) from each of the numerous vendors who have supplied the numerous hardware and software components of the LEC's' network elements. As the Commission should reaffirm, such claims violate the LEC's' obligation to provide nondiscriminatory access to network elements, and would create potentially insurmountable obstacles to any form of UNE-dependent entry -- for advanced services as much as basic services.

By its clear terms, § 251(c)(3) requires ILECs to provide access to their network elements on "rates, terms and conditions that are just, reasonable, and nondiscriminatory." The Commission has squarely held that "the term 'nondiscriminatory,' as used throughout § 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself," and that to satisfy its obligation to provide "nondiscriminatory" access an ILEC must provide new entrants with access that is "at least equal-in-quality to that which the incumbent LEC provides to itself."¹⁷³ Where an ILEC's existing facilities and equipment do not make access by new entrants possible, the Commission's rules thus require the ILECs to modify those facilities, where feasible, in order to enable the ILECs to comply with their access obligations. First Report and Order, ¶¶ 202.

Significantly, Congress's central purpose in adopting § 251(c)(3) was to ensure that new entrants would have access to the same cost structure, and hence have the same incentives to enter, as incumbents. Congress understood that "[a]n incumbent LEC's existing

¹⁷³ Local Competition Order, ¶¶ 218, 312-313, 315

infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant," and that this "most significant economic impediment[] to efficient entry into the monopolized local market must be removed." Local Competition Order, ¶¶ 10-11. To that end, § 251(c)(3) requires that an ILEC's "economies be shared with new entrants."¹⁷⁴

In implementing the Act's goals and requirements, the licensing and other intellectual property arrangements that govern access to the ILECs' network elements should be treated no differently from any other aspect of an incumbents' elements. If, as the ILECs claim, their existing licensing agreements prohibit them from providing new entrants with nondiscriminatory access to the incumbents' elements, the solution is both simple and straightforward: just as the ILECs must make any physical modifications to their facilities that might be required to enable new entrants to obtain access, so too it is the ILECs' obligation, where necessary, to modify their existing licensing agreements with their vendors to enable the ILECs to comply with their obligations to provide access to new entrants.¹⁷⁵ The ILECs cannot

¹⁷⁴ Infrastructure Sharing Order, ¶ 11. All of the forward-looking costs associated with right to use licenses, whether for the existing licenses or for any necessary amendments, would then be spread among all carriers, including the ILEC, in proportion to those carriers' use of the UNE in question.

¹⁷⁵ Intellectual property licenses are not materially different from many of the other ILEC assets (e.g., land, equipment) that are inputs to its network and that must be shared with CLECs. Accordingly, the costs associated with right to use licenses, whether for the existing licenses or for any necessary amendments, must be shared by all carriers who obtain access to the element, including the incumbent. Otherwise, one of the principle objectives of the Act's nondiscrimination requirement -- ensuring that costs incurred by CLECs using ILEC facilities are "similar to those incurred by incumbents" (Local Competition Order, ¶ 743) -- would be defeated. See Evaluation of the United States Department of Justice, Application of SBC Communications Pursuant to Section 271 to Provide In-region, InterLATA Services in Oklahoma, CC Docket No 97-121, filed May

(footnote continued on following page)

contract away their federal law duties by procuring or accepting contractual language with third parties that would purportedly require them to engage in the very discrimination that the Act forbids.¹⁷⁶

By contrast, to require new entrants to procure their own licensing agreements with each of the ILEC's vendors as a precondition of obtaining access would be to ensure the very discrimination and barriers to entry that § 251(c)(3) was designed to eliminate. This is so for at least two reasons: First, whereas the ILECs had a choice among numerous vendors at the time they purchased their network hardware and software, and therefore paid a presumptively competitive price, new entrants will be captive customers with no alternative but to deal with the vendor whom the ILEC had previously selected, and will thus almost certainly be required to pay more for the same rights than the ILEC. Second, as a party to the license agreement, the ILEC is in a considerably better position than the CLEC in assessing whether in fact any amendments are necessary. That is not only because the ILEC already has ready access to each agreement, but also because a license, like any other contract, is generally construed in accordance with the intent

(footnote continued from previous page)

16, 1997, at 65 (explaining that requiring CLECs to negotiate additional licenses with ILEC vendors "has unreasonable consequences, potentially delaying and increasing the expense of entry"). Indeed, an approach that did not require that the costs of intellectual property be spread among ILECs and CLECs would be especially perverse, because it would incent ILECs to construe their existing licenses as narrowly as possible, which would increase overall costs for the industry and thus consumers.

¹⁷⁶ There should be no dispute, for example, that when purchasing new equipment in the future the ILECs must ensure that such equipment, including accompanying licenses, permit the ILECs to satisfy the Act's access obligations

of the parties.¹⁷⁷ At a minimum, it would take much longer for a new entrant to negotiate amendments than an ILEC, and impose far greater costs on the new entrant.

Indeed, imposing the obligation to negotiate any necessary license amendments on the ILECs is the only resolution of this issue that would create the incentives that would reduce the overall costs of modifying existing intellectual property licenses. The ILECs proposal, which would require new entrants to secure their own license agreements with the ILECs' vendors, would create the incentive for the ILECs to construe their existing licenses as narrowly as possible, thereby requiring new entrants to incur the potentially unnecessary expense and delay of securing their own licenses. By contrast, if the obligation to secure any necessary license modifications were placed on the ILECs, the ILECs would have every incentive to construe their licensing agreements reasonably, and would only undertake the expense of modifying licenses where truly necessary.

In light of these principles, it is hardly surprising that in its Order implementing the analogous provisions of § 259, the Commission held that the obligation of securing any necessary license amendments rests with the ILEC. As the Commission there explained:

[P]roviding incumbent LECs may not evade their section 259 obligations merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate -- or allow -- provision of certain types of information to qualifying carriers. Therefore, we decide that the providing incumbent LEC must determine an appropriate way to negotiate and implement section 259 agreements with qualifying carriers, i.e., without imposing inappropriate burdens on qualifying carriers. In cases where the only means available is including the qualifying carrier in a licensing

¹⁷⁷ See Affidavit of Richard L. Bernacchi, ¶ 12, Appended to Reply Comments of AT&T Corp., Petition of MCI for Declaratory Ruling, CC Docket 96-98, CCBPol 97-4 (filed May 6, 1997).

arrangement, the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly. We emphasize that our decision is not directed at third party providers of information but at providing incumbent LECs. We merely require the providing incumbent LEC to do what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled under section 259.¹⁷⁸

Relying in part on the Infrastructure Sharing Order, the Montana PSC has likewise ruled that "[i]t is the responsibility" of the ILEC to "obtain[] any necessary licenses in relation to intellectual property of third parties . . . that may be required to enable the [new entrants] to receive any facilities or equipment" pursuant to their arbitrated agreement.¹⁷⁹ There is no justification, and it would thus be arbitrary, for the Commission to reach a different result here than it reached when implementing § 259.

In short, in order to ensure that new entrants can in fact obtain the nondiscriminatory access to the incumbent's network elements to which the Act entitles them, the Commission should reaffirm that it is the obligation of the ILECs, not of new entrants, to secure any necessary intellectual property licenses, or license modifications, that may be necessary to enable the ILECs to comply with their unbundled access and interconnection obligations. Unless and until the Commission correctly resolves this issue, no other step it makes in this proceeding will make viable a competitor's right to provide advanced services through access to an incumbent's UNEs.

¹⁷⁸ See Infrastructure Sharing Order, ¶ 70 (emphasis added).

¹⁷⁹ Order on Supplemental Disputed Issues, p. 20, Petition of AT&T Communications of the Mountain States, Inc., Utility Division, Docket No. D96.11.200, Order No. 5961d (Montana PSC, released April 30, 1998)

V. THE PROPOSALS FOR "TARGETED" LATA BOUNDARY MODIFICATIONS AS A MEANS TO PROVIDE INTERLATA RELIEF FOR ADVANCED SERVICES ARE MISGUIDED AND SHOULD NOT BE PURSUED

The Commission notes in the NPRM the possibility of exercising its authority under § 3(25)(B) of the Act to modify LATA boundaries to enable BOCs to provide what would otherwise be prohibited interLATA services to elementary and secondary schools, to rural areas with relatively fewer Internet network access points, to universities, and even to private-sector corporations.¹⁸⁰ Any application under § 3(25)(B) must, of course, be examined on an individual basis once it is filed, and resolved based on the facts it presents. But insofar as the NPRM suggests that the Commission might attempt to use its boundary modification authority broadly to enable BOCs in numerous instances and categories of instances to provide services that interexchange carriers would otherwise provide, that suggestion is ill-conceived and should not be adopted.

To begin with, any such attempted use of § 3(25)(B) is foreclosed by § 10(d) of the Act, which prohibits forbearance from the requirements of § 271 until those requirements have been "fully implemented." As the Commission has held, "Section 10(d) limits the manner in which the Commission may exercise its sole and exclusive authority to approve the establishment of or modification to LATA boundaries" and does not sanction "the piecemeal dismantling of the

¹⁸⁰ NPRM, ¶¶ 192-196.

LATAs."¹⁸¹ Section 706 does not and cannot alter that fundamental limitation for, as the Commission has also held, § 706 does not augment the Commission's authority but instead merely directs the Commission to use "the authority established elsewhere in the Act" in support of advanced services.¹⁸² Section 271 is one of the two "cornerstones" of the Act,¹⁸³ and its "central importance"¹⁸⁴ led Congress in § 10 to prohibit not only total forbearance from its requirements but any partial or purportedly minor acts of forbearance as well

The Commission's boundary modification authority under § 3(25)(B) is thus designed for, and limited to, a more modest purpose: "to give the Commission the same authority that the district court exercised in adjusting LATA boundaries under the AT&T Consent Decree."¹⁸⁵ Accordingly, the LATA boundary modifications the Commission has granted to date

¹⁸¹ See Petition for Declaratory Ruling Regarding U S WEST Petitions to Consolidate LATAs in Minnesota and Arizona, 12 FCC Rcd 4738, 4751, 4752 (1997) ("Declaratory Ruling").

¹⁸² NPRM, ¶ 74. Notably, in setting forth a list of the sources of authority the Commission may employ to promote deployment of advanced services, § 706 mentions "price cap regulation," "regulatory forbearance," and "measures that promote competition in the local telecommunications market," but not LATA boundary modification. While the list of powers in § 706 is not exhaustive, it is clear that Congress had in mind other authority-granting provisions, not § 3(25)(B), when it enacted § 706.

¹⁸³ Id., ¶ 73.

¹⁸⁴ Id.

¹⁸⁵ See id., ¶ 81 n.161; see also Memorandum Opinion and Order, Petitions for Limited Modifications of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations, 12 FCC Rcd 10646, 10654 (1997) ("ELCS MO&O") (stating that the Commission would "consider[] those factors previously considered by the Court").

have largely and properly been limited to the same "non-controversial"¹⁸⁶ types of modifications that the District Court frequently considered and granted under the MFJ. For example, the Commission has granted several applications for modifications to permit individual BOCs to provide flat-rated non-optional expanded local calling service to single "communities of interest" that straddled LATA boundaries, applying the same test to such requests as did the District Court.¹⁸⁷ The Commission has also granted boundary modification applications to change the "associations" of independent telephone companies with particular LATAs, so as to enable independent telephone companies that were upgrading their networks to "rout[e] traffic through a BOC switch in a different LATA" than the LATA with which it had previously been associated where such re-routing was appropriate, again following the standards that had been employed by the District Court for parallel requests under the MFJ.¹⁸⁸

In both instances, the Commission's and the Court's orders were premised on findings that interexchange competition would not in any way be impeded. For example, the Commission has carried forward the distinction made by the District Court between boundary

¹⁸⁶ See ELCS MO&O at 10649; Memorandum Opinion and Order, Petitions for LATA Association Changes by Independent Telephone Companies, 12 FCC Rcd 11769, 11771 (1997) ("Association Order").

¹⁸⁷ See, e.g., ELCS MO&O.

¹⁸⁸ See Association Order, 12 FCC Rcd at 11771-11772. The Common Carrier Bureau has granted one boundary modification request that does not fall in these categories -- a request by Southwestern Bell for a modification to enable it to provide ISDN to "20 or fewer" access lines in Hearne, Texas. See Memorandum Opinion and Order, Southwestern Bell Telephone Company Petition for Limited Modification of LATA Boundaries to Provide ISDN at Hearne, Texas, NSD No. NSD-LM-97-26, DA 98-923, ¶ 8 (released May 18, 1998). That request was highly limited, and no party sought review of the Bureau Order by the Commission.

modifications proposed to enable the provision to a community of flat-rated, non-optional local exchange service (which were generally granted) and boundary modifications proposed to enable a BOC to provide measured-rate, optional ELCS (which were consistently denied because the BOC would then be providing "what would otherwise be interLATA toll service without first meeting the requirements of Section 271").¹⁸⁹ The Commission has thus generally limited boundary modifications, among other things, to those involving historic "local service."¹⁹⁰

By contrast, expanding the scope of LATA boundary modifications so as to enable the provision to specific recipients of what would otherwise be deemed interexchange services would constitute a marked departure from the practice under the MFJ that formed the basis for the Commission's authority under § 3(25)(B).¹⁹¹ and would thus stray into the territory forbidden the Commission by § 10(d). Additionally, it would encourage the BOCs to seek "piecemeal waivers" and to "nibble incessantly at the edges of the restrictions" rather than undertaking the market-opening measures required by § 271.¹⁹² And while the Commission has sought in the past

¹⁸⁹ See ELCS MO&O, 12 FCC Rcd at 10657.

¹⁹⁰ See id. at 10653; see also Declaratory Ruling, 12 FCC Rcd at 4752 (District Court "strictly limited its grant of LATA boundary waivers to those that permitted traditional local service between nearby exchanges, and never condoned waiver requests that could permit a 'piecemeal dismantling' of the prohibition on the BOCs' provision of interLATA service") (citation omitted).

¹⁹¹ See, e.g., United States v. Western Elec. Co., 592 F. Supp. 846, 868 (D.D.C. 1984) (denying request by BellSouth to provide interexchange services solely to NASA).

¹⁹² See United States v. Western Elec. Co., 673 F. Supp. 525, 545 (D.D.C. 1987).

to limit boundary modifications to very specific services.¹⁹³ if the scope of such modifications is expanded along the lines suggested in the NPRM, "the slice of interexchange competition foreclosed, even if narrow today, could prove difficult to confine."¹⁹⁴ In that regard, while the Commission might seek to limit the modifications it describes to the provision of "data" services, in the age of digital technologies and Internet telephony there is no realistic means by which the Commission could enforce such a limitation.

Indeed, the BOCs have themselves shown no genuine interest in identifying areas in which targeted relief might be appropriate, but have instead made such claims solely as a pretext for broader relief. For example, while U S WEST sought forbearance from sections 251(c) and 271 in order purportedly to assist underserved rural areas, Mr. Joe Zell, President of US WEST Enterprise Networking Services, conceded in congressional testimony that even with regulatory relief U S WEST would not give a "commitment" to a time frame for deployment.¹⁹⁵ Similarly, Bell Atlantic presented an irresponsible claim of a bandwidth "emergency" in West Virginia as a basis for broad relief that turned out to be wholly trumped up: the high capacity data links Bell Atlantic claimed to be unavailable were in fact available from AT&T (Bell Atlantic had never asked), and when AT&T affirmatively offered those links to Bell Atlantic, Bell Atlantic

¹⁹³ See ELCS MO&O, 12 FCC Rcd at 10654 (permitting modification only for the purpose of providing flat rate non-optional local calling service)

¹⁹⁴ See United States v. Western Elec. Co., 969 F.2d 1231, 1242 (D.C. Cir. 1992); see id., 900 F.2d 283, 309 n.29 (noting concern over "the practical difficulty of enforcing a merely partial repeal" of a restriction) (emphasis in original).

¹⁹⁵ See Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, Senate Hearing Transcript No. 981120373 (April 22, 1998)

revealed that it had already made arrangements to obtain them from another interexchange carrier.¹⁹⁶

Nor is there any valid policy basis for enabling the BOCs to provide what would otherwise constitute interLATA transport. The market for interLATA transport is highly competitive, and its prices (other than for access charges) driven by market forces. There is no reason to believe that BOCs can legitimately provide that service better, or at a lower cost, than any other carrier. Indeed, any advantage a BOC would enjoy could only come by subsidizing these services from captive local ratepayers, such as by carrying traffic over its Official Services Network, or by favoring its own connections with discriminatory access to its local network. Such cross-subsidization or discrimination would damage the competitive interLATA market, and would interfere with market signals that otherwise would lead an efficient carrier to invest in capacity along the affected routes. In the long term, this would mean less innovation and choice - and higher prices -- for consumers.

VI. ILECS' ADVANCED SERVICES ARE SUBJECT TO THE RESALE REQUIREMENTS OF § 251(c)(4)

The Commission seeks comment on its tentative conclusion that the ILECs' advanced services are subject to the resale obligation of § 251(c)(4).¹⁹⁷ That conclusion is plainly correct. Section 251(c)(4) requires incumbent LECs to make available for resale "any

¹⁹⁶ See Opposition of AT&T, Request By Bell Atlantic - West Virginia For Interim Relief Under Section 706, Or, In The Alternative, A LATA Boundary Modification, NSD-L-98-99, DA 98-1506 (filed Aug. 10, 1998).

¹⁹⁷ NPRM, ¶¶ 187-189

telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers "¹⁹⁸ As the Commission definitively concluded in the "order" portion of the NPRM, "advanced services are telecommunications services,"¹⁹⁹ and it is likewise the case that the residential and business users and internet service providers to whom advanced services will be provided are not "telecommunications carriers "²⁰⁰ That ends the inquiry. Even if some such services could also be characterized as "exchange access" services (see ¶ 188), that would not remove them from the scope of § 251(c)(4), because that section makes no distinctions based on that characterization if its other requirements are met -- as they are here.

¹⁹⁸ 47 U.S.C. § 251(c)(4) (emphasis added).

¹⁹⁹ NPRM, ¶ 35.

²⁰⁰ See Report to Congress on Universal Service, ¶¶ 73-82 (holding that ISPs are not telecommunications carriers).

CONCLUSION

For the reasons discussed above, AT&T urges the Commission to adopt the recommendations set forth in these Comments. In particular, the Commission should not adopt its separate affiliate proposal; however, if it does decide to implement that proposal, it should strengthen significantly the requirements on the ILEC and its affiliate in order to ensure that the goals of this effort -- to prompt the ILEC to deploy advanced services and by doing so make available its network facilities on a nondiscriminatory basis to all CLECs -- are not circumvented. The Commission should also adopt AT&T's proposed rules with regard to loops, OSS, collocation, unbundling and resale; and the Commission should not allow the BOCs to evade Section 271's requirements for interLATA BOC entry by adopting a policy of piecemeal interLATA relief.

Respectfully submitted,

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